

<sup>3</sup> The Board notes that, following the July 17, 2018 decision, OWCP received additional evidence. However, the Board’s *Rules of Procedure* provides: “The Board’s review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal.” 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

## **ISSUES**

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$126,789.23 because she concurrently received FECA wage-loss compensation benefits and Social Security Administration (SSA) age-related retirement benefits without an appropriate offset for the period February 1, 2008 to March 31, 2018; (2) whether OWCP properly determined that appellant was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment; (3) whether OWCP properly required recovery of the overpayment by deducting \$1,400.00 every 28 days from appellant's continuing compensation payments; and (4) whether OWCP properly denied appellant's request for a prerecoupment hearing.

## **FACTUAL HISTORY**

On March 25, 1998 appellant, then a 60-year-old registered nurse, filed a traumatic injury claim (Form CA-1) alleging that on March 19, 1998 she injured the front of her body and chin when she slipped and fell forward on loose gravel while in the performance of duty. OWCP accepted her claim for multiple contusions, lacerations in the mouth, fractured jaw, and anxiety disorder. Appellant stopped work on the date of injury and did not return. OWCP paid wage-loss compensation on the supplemental rolls from May 4, 1998 on the periodic rolls effective March 31, 1999.

On EN1032 forms completed by appellant from March 4, 2008 to March 4, 2018, she indicated that she was not receiving SSA age-related retirement benefits as part of an annuity for federal service.

On March 30, 2018 SSA forwarded a Federal Employees Retirement System (FERS)/SSA dual benefits calculation form to OWCP. The form indicated that, beginning in February 2008 appellant's SSA rate with FERS was \$1,888.80 and without FERS \$948.10; beginning in December 2008 through November 2011, her SSA rate with FERS was \$1,998.30 and without FERS \$1,003.10; beginning in December 2011, appellant's rate with FERS was \$2,070.20 and without FERS \$1,039.10; beginning in December 2012, appellant's rate with FERS was \$2,105.20 and without FERS \$1,056.70; beginning in December 2013, appellant's SSA rate with FERS was \$2,136.80 and without FERS \$1,072.40; beginning in December 2014 through November 2016, appellant's SSA rate with FERS was \$2,173.10 and without FERS \$1,090.60; beginning in December 2016, appellant's SSA rate with FERS was \$2,179.50 and without FERS \$1,093.70; and beginning in December 2017, appellant's SSA rate with FERS was \$2,223.00 and without FERS \$1,115.50.

In a letter dated April 5, 2018, OWCP informed appellant that she had been receiving a prohibited dual benefit. It noted that, pursuant to section 8116(d) of FECA, the portion of SSA benefits earned as a federal employee was part of her retirement, and that the receipt of wage-loss compensation under FECA and this portion of her SSA retirement was a prohibited dual benefit. OWCP notified appellant that, based on information provided by SSA regarding the amount her SSA age-related retirement benefits were attributable to federal service, her FECA wage-loss compensation had been adjusted. An OWCP worksheet described its overpayment calculations.

On April 16, 2018 OWCP issued a preliminary determination finding that an overpayment of compensation in the amount of \$126,789.23 had been created. It explained that the overpayment occurred because a portion of appellant's SSA age-related retirement benefits that she received from February 1, 2008 to March 31, 2018 were based on credits earned while working in the Federal Government, and that this portion of her SSA benefit was a prohibited dual benefit. OWCP found her at fault in the creation of the overpayment because she failed to report on the annual EN1032 forms that she was in receipt of SSA benefits from 2008 to the present. It provided an overpayment action request form and an overpayment recovery questionnaire (Form OWCP-20) for appellant's completion.<sup>4</sup> OWCP explained that its calculation of the overpayment, informed her of the actions she could take, and allotted 30 days for her to respond.

On May 22 2018 appellant faxed the overpayment action request to an OWCP senior claims examiner. She requested a prerecoupment hearing before OWCP's Branch of Hearings and Review on the issues of fault and possible waiver of recovery of the overpayment. Appellant indicated that she believed that the overpayment occurred through no fault of her own, writing that she did not understand what the form was asking for when she filled it out. She did not submit an overpayment recovery questionnaire. In an attached letter, appellant's representative reported that, because appellant and her husband required visits to an emergency room and the physician, she was unable to obtain the requested paperwork at that time. The representative also requested a hearing.

In correspondence postmarked June 5, 2018, appellant's representative also mailed a copy of the overpayment action request form and letter to OWCP's Branch of Hearings and Review, noting that she had done so based on the instructions of the claims examiner.

By decision dated July 5, 2018, OWCP denied appellant's request for a prerecoupment hearing as untimely filed. It informed her that, as her request was not made within 30 days of the April 16, 2018 decision, she was not, as a matter of right, entitled to a prerecoupment hearing.

By decision dated July 17, 2018, OWCP finalized the preliminary overpayment determination. It found that appellant was paid both FECA compensation and SSA age-related retirement benefits without a FERS adjustment for the period February 1, 2008 to March 31, 2018, a prohibited dual benefit. OWCP noted that she failed to report that she was receiving SSA benefits on the EN1032 forms she completed from 2008 to present, and that she had not submitted the requested overpayment questionnaire or financial information. It found appellant at fault in the creation of the overpayment because she knowingly accepted wage-loss compensation to which she was not entitled. OWCP determined that \$1,400.00 would be deducted from her continuing compensation every 28 days.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the

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<sup>4</sup> OWCP explained that appellant was to attach supporting documentation to the Form OWCP-20 overpayment recovery questionnaire including income tax returns, bank account statements, bills and cancelled checks, pay slips, and any other records which supported income and expenses listed.

performance of his or her federal employment.<sup>5</sup> Section 8129(a) of FECA provides, in pertinent part: “When an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.”<sup>6</sup>

Section 10.421(d) of the implementing regulations requires that OWCP reduce the amount of compensation by the amount of any SSA benefits that are attributable to federal service of the employee.<sup>7</sup> FECA Bulletin No. 97-9 provides that FECA benefits have to be adjusted for the FERS portion of SSA benefits because the portion of the SSA benefit earned as a federal employee is part of the FERS retirement package, and the receipt of FECA benefits and federal retirement concurrently is a prohibited dual benefit.<sup>8</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$126,789.23 for the period February 1, 2008 to March 31, 2018.

In its July 17, 2018 decision, OWCP found that an overpayment of compensation was created for the period February 1, 2008 to March 31, 2018 based on the evidence OWCP received from SSA with respect to age-related retirement benefits paid to appellant. A claimant cannot receive both FECA compensation for wage loss and SSA age-related retirement benefits attributable to federal service for the same period.<sup>9</sup> The information provided by SSA indicated that appellant received SSA age-related retirement benefits that were attributable to federal service during the period February 1, 2008 to March 31, 2018.

To determine the amount of the overpayment, the portion of the SSA age-related retirement benefits that were attributable to federal service must be calculated. OWCP received documentation from SSA with respect to the specific amount of SSA age-related retirement benefits that were attributable to federal service. The SSA provided the compensation rate with FERS, and without FERS for specific periods February 1, 2008 to March 31, 2018. OWCP provided its calculations for each relevant period based on an SSA worksheet and in its April 16, 2018 preliminary overpayment determination. No contrary evidence was provided.

The Board has reviewed OWCP’s calculations of the dual benefits received by appellant for the period February 1, 2008 to March 31, 2018 and finds that an overpayment of compensation in the amount of \$126,789.23 was created.<sup>10</sup>

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<sup>5</sup> 5 U.S.C. § 8102(a).

<sup>6</sup> *Id.* at § 8129(a).

<sup>7</sup> 20 C.F.R. § 10.421(d); *see D.W.*, Docket No. 19-0546 (issued March 4, 2020).

<sup>8</sup> FECA Bulletin No. 97-9 (issued February 3, 1997).

<sup>9</sup> 5 U.S.C. § 8116(d)(2); *see L.W.*, Docket No. 19-0787 (issued October 23, 2019).

<sup>10</sup> *R.D.*, Docket No. 19-1598 (issued April 17, 2020).

## **LEGAL PRECEDENT -- ISSUE 2**

Section 8129(b) of FECA provides that “[a]djustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.”<sup>11</sup> On the issue of fault, section 10.433(a) of OWCP’s regulations provides that an individual is with fault in the creation of an overpayment who: (1) made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; (2) failed to furnish information which the individual knew or should have known to be material; or (3) with respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.<sup>12</sup>

Section 10.433(b) of OWCP’s regulations provides that whether or not OWCP determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual’s capacity to realize that he or she is being overpaid.<sup>13</sup>

When a claimant receives benefits from the SSA as part of an annuity under FERS concurrently with disability/wage-loss compensation, the claimant should be found without fault unless there is evidence on file that the claimant was aware that the receipt of full SSA benefits concurrent with disability/wage loss compensation was prohibited.<sup>14</sup>

OWCP’s procedures in effect at the time of the July 17, 2018 decision provided that in situations where an equally valid argument could be made both for “without fault” and “with fault,” the benefit of the doubt should go to the claimant, and a finding of without fault should be made consistent with the nature of FECA as social legislation designed to benefit entitled employees.<sup>15</sup>

## **ANALYSIS -- ISSUE 2**

The Board finds that OWCP improperly determined that appellant was at fault in the creation of the overpayment for the period February 1, 2008 to March 31, 2018.

As noted above, the Federal (FECA) Procedure Manual identifies that, regarding an SSA dual benefits scenario, where the claimant receives SSA benefits as part of an annuity under FECA, which results in an overpayment, the claimant should be found not at fault unless there is evidence on file that the claimant was aware that the receipt of full SSA age-related retirement benefits concurrent with disability/wage-loss compensation was prohibited.<sup>16</sup> Because of the complex

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<sup>11</sup> 5 U.S.C. § 8129(b).

<sup>12</sup> 20 C.F.R. § 10.433(a); *see J.S.*, Docket No. 19-0824 (issued October 4, 2019).

<sup>13</sup> *Id.* at § 10.433(b); *see also* Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Determinations in an Overpayment*, Chapter 6.300.4(d) (September 2018).

<sup>14</sup> *Id.* at Chapter 6.300.4g(4) (September 2018).

<sup>15</sup> *Id.* at Chapter 6.200.5 (June 2009).

<sup>16</sup> *Id.*

nature of SSA benefits administration, appellant could not have been expected to be able to calculate the amount of an offset. Therefore, she could not reasonably have been aware during the relevant period that her concurrent receipt of SSA age-related retirement benefits constituted an actual prohibited dual benefit.<sup>17</sup>

As previously noted, to determine if an individual was at fault with respect to the creation of an overpayment, OWCP examines the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.<sup>18</sup> The Board finds that appellant was without other options to avoid a potential FECA overpayment. Therefore, based on the circumstances described, OWCP has not met its burden of proof to establish that she was at fault in the creation of the overpayment for the period February 1, 2008 to March 31, 2018.<sup>19</sup>

As appellant was not at fault in the creation of the overpayment for the period February 1, 2008 to March 31, 2018, the case will be remanded to OWCP to issue a new preliminary determination on the issues of waiver and, if warranted, recovery of the overpayment which affords her the right to request a prerecoupment hearing on those two issues.<sup>20</sup>

### **CONCLUSION**

The Board finds that appellant received an overpayment of compensation in the amount of \$126,789.23 for the period February 1, 2008 to March 31, 2018. The Board further finds that she was not at fault in the creation of the overpayment.<sup>21</sup>

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<sup>17</sup> *D.G.*, Docket No. 19-0684 (issued December 24, 2019) (The Board affirmed OWCP's finding that, due to the complexity of SSA age-related benefits administration, appellant was not with fault in the creation of the overpayment because he could not have reasonably known that an improper payment had occurred. OWCP determined that appellant was not expected to be able to calculate the amount of the offset).

<sup>18</sup> *Supra* note 13.

<sup>19</sup> *See E.H.*, Docket No. 18-1009 (issued January 29, 2019).

<sup>20</sup> *See* 20 C.F.R. §§ 10.431(d) and 10.439.

<sup>21</sup> In light of the Board's finding as to Issue 2, Issues 3 and 4 are rendered moot.

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 17, 2018 decision of the Office of the Workers' Compensation Programs is affirmed in part and reversed in part and the case is remanded for further proceedings consistent with this decision of the Board. The July 5, 2018 decision is set aside as moot.

Issued: September 3, 2020  
Washington, DC

Christopher J. Godfrey, Deputy Chief Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board